



# Appeal Application

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Appeals are time sensitive and must be received by the City Clerk specified time period from a decision or final action by a decision-maker. It is advisable to consult with the Department managing the issue if there is question with regards to appealing an action. This is an appeal of the:

- Community Development Director Action to the Planning Commission - \$1,637
- Zoning Administrator Action to the Planning Commission - \$1,637
- Planning Commission Action to the City Council - \$1,637
- Hearing Officer Action to the City Council - \$1,637
- Building Official/Fire Marshal Action to the Building/Fire Board of Appeals - \$1,637
- Chief of Police Action on an Operator License to the City Manager - \$710
- City Manager Action on a Special Events Permit to the City Council - \$1,639
- Harbor Resources Manager Action on a Lease/Permit to the Harbor Commission - \$100
- Harbor Resources Manager Action to the Harbor Commission - Hourly Cost
- Harbor Commission Action to the City Council - Hourly Cost
- Other - Specify decision-maker, appellate body, Municipal Code authority and fee: \_\_\_\_\_

**Appellant Information:**

Name(s): Southwest Regional Council of Carpenters

Address: 335 Spreckels Drive, Suite H

City/State/Zip: Aptos, CA 95003

Phone: (831) 429-4055 Email: nwhipps@wittwerparkin.com

**Appealing Application Regarding:**

Name of Applicant(s): Starboard MacArthur Square, LP Date of Final Decision: 2/21/2019

Project No.: PA2017-107 Activity No.: SD2017-004, LA2018-004, AH2018-001, and ER2017-001

Application Site Address: 1701 Corinthian Way; 1660 Dove Street; 4251, 4253, and 4255 Martingale Way; and 4200, 4220, and 4250 Scott Drive

Description of application: Newport Crossings Mixed Use Project - development of a mixed-use residential project consisting of 350 residential dwelling units, 7,500 square feet of commercial space, and a 0.5-acre public park. Demolition of existing commercial center.

Reason(s) for Appeal (attach a separate sheet if necessary): See attached letter

Signature of Appellant: Date: 3/7/19

**FOR OFFICE USE ONLY:**

Date Appeal filed and Administrative Fee received: March 7, 2019.

City Clerk  
Deputy Clerk for

cc: Department Director, Deputy Director, Staff, File  
Cashier Code: CDD004 (Harbor Appeals-HBR001)

CDD 222



### **Attachment to Appeal to City Council**

Newport Crossings Mixed-Use Project; Project File No. PA2017-107  
Activity Nos. SD2017-004, LA2018-004, AH2018-001, and ER2017-001

### **Justification/Reason for Appeal**

The Southwest Regional Council of Carpenters (Southwest Carpenters) appeals the decision of the City of Newport Beach (City) Planning Commission to approve the Newport Crossings Mixed-Use Project (Project) due to the City's failure to conduct adequate environmental review, including its discussion of cumulative impacts, project alternatives, air quality, greenhouse gas emissions, cultural resources, land use, transportation and traffic, as well as the City's failure to provide adequate responses to comments by Southwest Carpenters and others. Furthermore, according to the City's standards, the Project well exceeds the allowable density for the Project site, in violation of the City's Municipal Code and Newport Place Planned Community Development Standards.

#### **Air Quality**

##### *Consistency with the Air Quality Management Plan*

The City's air quality analysis failed to satisfy the requirements of the California Environmental Quality Act (CEQA). “[A]n EIR is ‘an informational document’” aimed at providing “detailed information about the effect which a proposed project is likely to have on the environment....” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 [“*Laurel Heights*”], citing Pub. Resources Code § 21061 and Cal. Code Regs., tit. 14, § 15003(b)-(e).) An EIR that is unclear fails to adequately inform the public about a potential project’s impact on the environment.

The City failed to adequately support its conclusion that “the proposed project is consistent with the applicable air quality management plan.” (DEIR, pp. 5.2-22 – 5.2-23.) In the EIR, the City reasoned, “projects that are consistent with the local general plan are considered consistent with the air quality-related regional plan.” (*Ibid.*) However, the Project will redevelop a commercial retail space into a hybrid-residential/retail/restaurant development, which will increase the intensity of the use of the Project site. (*Ibid.*) Rather than support its conclusion with evidence, the EIR summarily states that the Project would be within the projected housing growth, but it does not explain why. (*Ibid.*) In addition, the EIR fails to address how the Project’s 35-percent density bonus above what is typically permitted for housing on site will increase the population density or how this, in turn, could impact the Project’s consistency with the applicable Air Quality Management Plan. (See *id.* at pp. 3-12, 5.2-23) (discussing the density bonus.)

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The City does not explain how compliance with various regulatory requirements (RR AIR-1, RR AIR-2, and RR AIR-3) have any bearing on the potential of the Project to conflict with the Air Quality Management Plan, such that compliance with these unrelated regulations would reduce Project impacts to less than significant *prior* to mitigation. (See DEIR, p. 5.2-23.) The air quality analysis frequently references regulations that the Project must comply with or measures to reduce impacts that are contained in other portions of the EIR, without a description of the measures, reference to where they are described, or, most importantly, how these measures serve to reduce Project impacts. (See, e.g., DEIR, pp. 5.2-22 - 5.2-31.) As another example, the EIR explains, “with implementation of RR AIR-1, RR AIR-2, and RR AIR-4, Impact 5.2-3 would be less than significant.” (DEIR, p. 5.2-26.) But the EIR fails to explain or clearly indicate what these impacts or measures entail.

#### *Cumulative Impacts*

The City’s conclusion regarding cumulative air quality impacts that “air pollutant emissions associated with the proposed project would not be cumulatively considerable” is not supported by the evidence. (DEIR, p. 5.2-31; See *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 511–512, 515 (Agency “must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order”).)

In the EIR, the City reasoned, “any project that does not exceed or can be mitigated to less than the daily regional threshold values is not considered by SCAQMD to be a substantial source of air pollution and does not make a cumulatively considerable contribution to a cumulative air quality impact.” (DEIR, p. 5.2-31.) SCAQMD has never adopted such a threshold of significance, and the City cannot rely on this alleged adoption to legitimate its analytical approach. Further, the City’s approach runs counter to definition of cumulative impacts. Critically, “Cumulative impacts can result from *individually minor but collectively significant projects* taking place over a period of time.” (14 Cal. Code Regs. § 15355 (emphasis added).) Equating the cumulative impacts to direct and indirect impacts renders this analysis redundant, uninformative, and meaningless.

The only SCAQMD source that states this is an appendix in a SCAQMD White Paper. The SCAQMD White Paper upon which the City relies for this supposed significance threshold<sup>1</sup> was generated by a SCAQMD Advisory Group. This White Paper was not generated pursuant to SCAQMD’s rulemaking authority. As its name suggests, the Advisory Group is not composed of the legislative body of SCAQMD, and its meetings are not subject to the Brown Act. (See

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<sup>1</sup> See generally, White Paper on Regulatory Options for Addressing Cumulative Impacts from Air Pollution Emissions (White Paper), and White Paper Appendix D, page D-3; Summary Minutes of the South Coast Air Quality Management District Friday, September 5, 2003.

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SCAQMD Advisory Group White Paper website, <https://www.aqmd.gov/nav/about/groups-committees/environmental-justice-advisory-group>.)

The White Paper is a report, not a rule. The report in question was designed to address cumulative air quality impacts as these impacts relate to environmental justice by creating what it named a “Cumulative Impacts Reduction Strategy.” The Cumulative Impacts Reduction Strategy was designed to address Air Quality impacts to some of Southern California’s most vulnerable communities. The language the City relies on did not appear in this paper; rather, it was included in an appendix. The body of the White Paper makes *no reference* to the appendix in question. The City’s supposed significance threshold is only referenced in passing on one of the final pages of this background appendix.

On September 5, 2003, SCAQMD voted to “Proceed with the Cumulative Impacts Reduction Strategy (CIRS) Outlined in the White Paper” as a minute action. (Summary Minutes of the South Coast Air Quality Management District Friday, September 5, 2003.) SCAQMD’s action did not amount to an adoption of a threshold through ordinance, resolution, rule or regulation, as required by CEQA Guidelines section 15064.7(b). SCAQMD’s Board only considered the White Paper at one meeting and voted as part of a minute action to implement the environmental justice mitigation strategies outlined in the main body of the White Paper. The language regarding SCQAMD’s supposed approach to its cumulative impacts analysis was neither the subject nor purpose of the White Paper and was not approved as part of the Board’s action to “Proceed with the Cumulative Impacts Reduction Strategy,” which *was* the subject of the White Paper. A side comment in a background appendix on an unrelated topic cannot amount to SCAQMD adopting a standardized threshold of significance.

Regardless, even if SCAQMD had intended to adopt this approach as a threshold of significance, the City cannot rely on a threshold of significance that is patently illegal and contrary to the spirit and letter of CEQA. The City’s approach to cumulative air quality impacts misinforms readers, undermines its entire air quality impacts analysis, and is indicative of its improper treatment of the cumulative impacts analysis throughout the EIR.

The City provides no analysis of cumulative impacts from past, present, and reasonably foreseeable future projects. The data provided in the Cumulative Projects List shows that the projects listed will result in significant construction and will increase residential, hotel, commercial, office, and other uses. (See DEIR, pp. 4-13 – 4-14.) This will result in increased vehicle trips and will ultimately delay the air basin’s timely attainment with air quality standards designed to protect human health and the environment. (*Ibid.*)

In the cumulative air quality impacts analysis, the EIR does not analyze, let alone mention, any of the projects on the Cumulative Projects List included in the EIR, or other

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projects in the greater South Coast Air Basin region, nor does it disclose the air quality impacts of each project. (DEIR, p. 5.2-31.) Tellingly, the City does not disclose whether any of the cumulative projects it lists have been found to have significant and unavoidable impacts, to which the Project will cumulatively contribute. As described, below, the Cumulative Projects List also lacks sufficient information to determine whether each project might contribute to cumulative air quality impacts, either on a local or regional level. (See *id.* at pp. 4-13 – 4-14.)

Finally, the EIR arbitrarily segregates cumulative construction and operational air quality impacts. (DEIR, p. 5.2-31.) Separating cumulative construction impacts from cumulative operational impacts where these emissions occur concurrently is a fiction, as nothing would prevent emissions from construction projects cumulatively contributing to concurrent emissions from operational projects.

## Greenhouse Gas Emissions

### *Consistency with Plans and Policies*

“[A]n EIR is ‘an informational document’... ‘[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment....’” (*Laurel Heights, supra*, 47 Cal.3d at 391, citing Cal. Pub. Resources Code § 21061 and Cal. Code Regs., tit. 14, § 15003(b)-(e).) Yet the EIR’s discussion of greenhouse gas (“GHG”) impacts fails to properly identify or analyze applicable regulations and plans.

The City incorrectly relies on federal and statewide plans and regulations which were not designed to be applied at the project-level. (See *Center for Biological Diversity v. Dep’t of Fish & Wildlife* (2015) 62 Cal.4th 204 (“*Newhall Ranch*”); EIR, pp. 5.6-5 - 5.6-15.) The City provides little analytical connection between these plans and requirements for the Project itself. These plans, for example, discuss GHG emissions requirements for manufacturers of vehicles and suggestions for local governments, but do not provide project-specific standards for development projects. (DEIR, pp. 5.6-6 – 5.6-9.)

The City states that Impact 5.6-2, which provides, “[i]mplementation of the proposed project would not conflict with an applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of GHGs,” would be “less than significant.” (DEIR, pp. 5.6-22, 5.6-25.) In reaching this conclusion, the City discusses two policies: the California Air Resources Board (“CARB”) Scoping Plan and the Southern California Association of Governments’ (“SCAG”) Regional Transportation Plan/Sustainable Communities Strategy. (DEIR, pp. 5.6-23 – 5.6-25.) But the City does not explain why these are “applicable” plans. (*Ibid.*) In fact, the City admits that the CARB Scoping Plan “is not directly applicable to cities/counties and individual projects,” and, is, thus, not a proper document against which to measure the impacts of Project. (DEIR, p. 5.6-23.) Thus, the City does not provide sufficient information in the EIR

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to determine whether the Project’s incremental addition of greenhouse gasses would be cumulatively considerable and thus significant. (*Newhall Ranch, supra*, 62 Cal.4th 204, 219.)

#### *Mitigation*

The City fails to provide adequate mitigation to reduce GHG-related impacts. The City’s findings that the Project would result in less than significant impacts and, thus, not require mitigation measures are not supported by evidence in the record. (See DEIR, p. 5.6-25; Cal. Code Civ. Proc. § 1094.5; Cal. Pub. Resources Code § 21168.)

#### **Cultural Resources**

The City’s cultural resources mitigation is unenforceable and does not ensure Project impacts to cultural resources will remain less than significant. The City must ensure “that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures,” and must have a monitoring program to ensure the implementation of mitigation. (Cal. Pub. Resources Code, § 21081.6 (a) and (d).) “*The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded.*” (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173; Cal. Pub. Resources Code, § 21002.1(b) [emphasis in original].)

The EIR found that the Project has the potential to significantly impact cultural and paleontological resources. (DEIR, p. 5.4-10.) The EIR states that, if archeological resources are discovered during grading, “all construction work within 50 feet of the find shall cease and the archeologist will assess the find for importance.” (*Ibid.*) If the find is not important, “work will be permitted to continue in the area.” (DEIR, pp. 5.4-10 – 5.4-11.) But the EIR does not explain what should occur if the find is important or if the find is Native American in origin and does not provide enforceable mitigation measures to protect such a find. (*Ibid.*) If paleontological resources are discovered during grading, the EIR likewise does not explain what should occur if the find is important and does not provide enforceable mitigation measures to protect such a find. (DEIR, p. 5.4-11.) This does not ensure enforceable protection of important resources.

#### **Land Use**

The City’s land use analysis is uninformative and flawed. An EIR that is unclear or omits key information fails to adequately inform the public about a potential project’s impact on the environment. (See *Laurel Heights, supra*, 47 Cal.3d 376, 391 (“an EIR is an informational document” that should provide “detailed information about the effect which a proposed project is likely to have on the environment....”), citing Cal. Pub. Resources Code § 21061, Cal. Code Regs., tit. 14, § 15003(b)-(e) (citations omitted).)

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#### *Consistency with the General Plan*

In the Housing and Population component of the EIR, the EIR states “most of the proposed development is consistent with the general plan,” yet Table 5.9-1, which analyzes land use consistency, states that the Project is consistent with all “Applicable Goals and Policies” of the Newport Beach General Plan (“General Plan”). (Compare DEIR, p. 5.11-10 with pp. 5.9-12 - 5.9-25.) This inconsistency misinforms the public and decisionmakers.

#### *Density Bonus*

The EIR discusses the density bonus in several places, but does not explain how the Project, in fact, meets the requirements for such a density bonus. (See DEIR at § 5.9.) In addition, when analyzing the Project’s compliance with the General Plan, the EIR states, “[e]xact rent prices have not been determined at this time” for “affordable” units and does not provide any assurance that the City will require that the Project provide an appropriate number of units that are actually affordable. (DEIR, p. 5.9-12.) Nor does it explain how the Project qualifies for a waiver of existing height requirements, such that it may be constructed more than 20 feet higher than what is permitted by existing land use regulations. (*Ibid.*) All of these factors impact the Project’s consistency with land use requirements. If the Project does not qualify for a density bonus, Project density far exceeds density allowed for the Project site.

#### *Base Density*

Notwithstanding the density bonus, according to the City’s standards, the Project exceeds the maximum allowable density for the Project site.

The EIR states the Newport Place Planned Community Development Standards only permit a density of 50 dwelling units per “net acre,” as opposed to “gross acre.” (DEIR, p. 3-11-3-12.) The EIR goes on to state the net acreage of the site is 5.19 acres, after subtracting 0.5 acres for a dedicated park. (DEIR, p. 3-12.) However, the “net acres” of the Project site are, in fact, much fewer than 5.19 acres, as this calculation does not account for required undevelopable setbacks. The Residential Overlay portion of the Newport Place Planned Community Development Standards requires a thirty-foot “street” setback and a ten-foot “internal setback.” (Newport Place Planned Community Development Standards, Part III § V(C).) The Project has over 2,300 feet of “street” frontage (Dove Street, Scott Drive, Corinthian Way and Martingdale Way) and over 370 feet of land subject to an internal setback. In total, this reduces the net developable acreage by over 1.65 acres, meaning the Project has 3.54 net developable acres. Thus, by the City’s standards, the Project can only accommodate approximately 177 units, compared to the 259 units the City proposes to allow. The Project far exceeds the allowable density of the Project site.

#### *Consistency with Zoning Regulations*

As in other portions of the EIR, the City concludes that certain regulations and/or practices would ensure that the Project would not result in significant environmental impacts but does not explain how. (See DEIR, p. 5.9-26.) RR LU-1 and RR LU-2 assume compliance with

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all zoning regulations, including the regulations from the Newport Place Planned Community Development Standards.

The City's claim that the Project complies with these regulations is not supported by the record. (DEIR, p. 5.9-9.) The Project does not comply with all zoning regulations, as the Project includes a requested height increase of over twenty feet above the height allowed under these standards.

#### *Cumulative Impacts*

The City's discussion of cumulative impacts to land uses does not bridge the analytic gap between raw evidence and its conclusions. (DEIR p. 5.9-27; see *Topanga, supra*, 11 Cal.3d at 511–512, 515; Cal. Code Civ. Proc. § 1094.5; Cal. Pub. Resources Code § 21168.) The City's cumulative impacts analysis fails to provide an adequate “summary of the expected environmental effects to be produced by those projects” on the Cumulative Projects List. (See Cal Code Regs., tit. 14, § 15130(b)(4).)

The EIR makes conclusory statements, without analysis of individual projects, that the project would not contribute to cumulatively considerable impacts, because other developments “would be subject to compliance with regional and local plans.” (DEIR p. 5.9-27.) But it does not examine any of the developments listed on the Cumulative Projects List, describe whether they are compatible with existing land uses, or discuss if, together, they would result in a considerably cumulative impact. (*Id.*) Likewise, the EIR states that the area around the Project is “in transition from strictly nonresidential uses... to a wider range of mixed uses,” but does not explain how this transition complies with an existing land use plan, the Newport Beach General Plan, or zoning regulations. (*Id.*)

#### **Transportation and Traffic**

An EIR's cumulative impacts analysis “shall reflect the severity of the impacts and their likelihood of occurrence . . . .” (Cal. Code Regs., tit. 14, § 15130(b).) Providing incomplete information “concerning the severity and significance of cumulative impacts impedes meaningful public discussion and skews the decisionmaker's perspective concerning the environmental consequences of the project, the necessity for mitigation measures, and the appropriateness of project approval.” (*Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 431.)

The EIR states that the “proposed project would not result in either project-specific significant or cumulatively considerable impacts” to traffic and transportation, but the City does not explain how it reaches these conclusions. (DEIR, p. 5.14-31.) The EIR states, “the traffic study included traffic from 25 projects in Newport Beach,” but does not provide a direct citation or reference for the traffic study, nor does it discuss which projects were examined, where they were located, or what the objective traffic impacts are from each project. The EIR also does not

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mention or examine the Cumulative Projects List, or how developments on this list might impact traffic and transportation in conjunction with the existing project. (See *ibid.*) Also, it was erroneous for the City to only consider cumulative projects within the borders of the City, as the Project is less than half a mile away from Costa Mesa and Irvine.

The EIR's evaluation of cumulative future impacts is especially lacking. The City analyzed cumulative operational under a Future Year 2022 Plus Project scenario. The Traffic Impact Analysis found that MacArthur Boulevard/Michelson Drive and MacArthur Boulevard/Campus Drive intersections would operate at levels of service (LOS) of "F" and "E," respectively. (DEIR, Appx. J, p. J-31.) Without further explanation, the Traffic Impact Analysis states "LOS E is acceptable" at these intersections. (*Ibid.*) No reasoning supports this conclusion, nor does this statement address that one of these intersections was found to operate at LOS F.

Moreover, by only considering cumulative conditions from a "Future Year 2022 Plus Project" scenario, the EIR entirely fails to provide an adequate evaluation of cumulative operational impacts. The Project will remain operational well beyond 2022. Crucially, *the Project will not even be constructed or occupied by 2022*, as "the project would be built in a single phase spanning approximately 38 months, from December 2019 to **February 2023**." (DEIR, p. 3-33 (emphasis added).) Thus, the cumulative traffic impacts analysis fails to evaluate the traffic impacts from the vast majority of Project trips, including all of the traffic impacts generated during the decades of Project operation.

### **Cumulative Projects List**

The data provided in the Cumulative Projects List is insufficient to fully examine the listed projects. (DEIR, pp. 4-13 – 4-14.) This list does not include a description of related development, indicate when these projects will be constructed or operational, or identify how close these other projects are to the Project site. (*Ibid.*) The Cumulative Projects List fails to provide enough information to evaluate the cumulative impacts relating to the Project, including a description of each development, an address for each development, the distance of each project from the Project site, as well as projected construction and operational dates. Further, the City does not clarify whether it considered cumulative impacts from projects in other cities, such as Irvine.

### **Alternatives**

CEQA provides a "*substantive mandate* that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures" that can lessen the environmental impact of proposed projects. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134, citing Pub. Resources Code § 21081 [emphasis added]; *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233; Pub. Resources Code § 21002.) A lead

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agency's ability to comply with this mandate is predicated on a clear analysis of correct findings of a project's impacts. "Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process." (*Laurel Heights, supra*, 47 Cal.3d at 404; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1350.)

The Project alternatives analysis, as drafted, does not adequately assess whether alternatives would avoid or substantially lessen significant Project effects, because the EIR either does not provide a sufficient analysis or incorrectly finds impacts to be less than significant, including in the areas of air quality, greenhouse gases, land use, and traffic and transportation. The EIR's alternatives analysis, therefore, does not identify feasible alternatives that lessen adverse impacts, nor does it adequately examine whether the alternatives listed would mitigate or avoid Project impacts. (See DEIR, § 7.)

### **Aggrieved by Decision**

Southwest Carpenters live and work in the City of Newport Beach and are concerned about the environmental impacts of this Project. Without an adequate environmental review document, Southwest Carpenters is aggrieved because the Project's environmental impacts have not been fully or properly disclosed, mitigated, or addressed in the EIR.

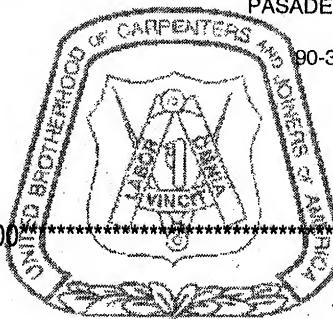
### **Decisionmaker Error**

The Planning Commission erred in approving the EIR for the Project. The EIR fails the substantive, procedural, and informational requirements of CEQA, the City's findings are not supported by substantial evidence, and the EIR does not adopt all feasible mitigation measures. This failure to conduct adequate environmental review violates CEQA and invalidates the EIR. Furthermore, the Project violates state and local planning laws.

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90-3820/1222

2/19/2019

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City of Newport Beach  
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Newport Beach, CA 92658

MEMO

Newport Crossings Mixed Use Proj

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(CDD222)

CDD222 PLANNING APPEALS

(CDD222)

2019 Item: CDD222

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CDD222 PLANNING

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